

H.B. 1503

Senate Education Committee

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Chair Schaible and members of the Senate Education Committee: My name is Lisa Johnson, and I serve as the Vice Chancellor for Academic and Student Affairs of the North Dakota University System (NDUS). I am here on behalf of the North Dakota University System to provide testimony in opposition to H.B. 1503.

Last session, the NDUS worked with the Legislative Assembly and this committee on S.B. 2320, which enacted N.D.C.C. Chapter 15-10.4, which required the SBHE and each institution to adopt a policy to protect student freedom of speech, assembly, and expression. As a result, the SBHE and each campus developed both systemwide and campus-specific policies implementing that Chapter before the statutory deadline of August 27, 2019. *See, e.g.,* [SBHE Policy 503.1 – Student Free Speech and Expression](#). On September 3, 2019, a copy of the SBHE Policy and each Campus Policy was sent to Legislative Management, as evidence that the SBHE and all campuses met the statutory deadline. Since that date, the NDUS had not received any complaints or negative feedback about the policy adopted by the SBHE until the introduction of H.B. 1503. This is buttressed by the fact that there have been no substantiated reports of student free speech violations in at least 12 years within the NDUS.

In addition, since the adoption of these student free speech policies, the SBHE, the NDUS, and the eleven campuses took the additional step to enhance and protect the rights of student organizations on campus. Working closely with the North Dakota Student Association (NDSA), the SBHE adopted [SBHE Policy 503.3](#), which provides broad protections for students and student organization participation in political campaigns, events, and other political activities (with only a narrow limitation required by state law). This new, student-centric policy was devised with input from FIRE, and received positive feedback from FIRE's Azhar Majeed:

"This policy looks quite solid to me and my colleagues. We appreciate your willingness to consider our input and to adjust the policy accordingly. We likewise appreciate that the policy begins with the basic premise that students' speech rights, including political speech rights, are to be stringently protected, with only exceptions made pursuant to state law."

The NDUS was grateful for FIRE's assistance and recommendations in formulating that policy and additionally incorporated resources provided by FIRE when aiding the campuses in developing their campus specific policies in compliance with that of State Board Policy 503.1 prior to the implementation deadline of August 27, 2019. The SBHE and NDUS have a policy process which promotes constant review and improvement, and take seriously policy concerns raised from both inside and outside of the NDUS. Had NDUS been made aware of the audit referenced by Mr. Cohn

in his testimony, NDUS could have worked on improvements which could have saved everyone's time today.

However, even up until today, the NDUS is unsure as to the rationale for the introduction of H.B. 1503 rather than working through the policy process. Not only is it redundant and unnecessary, it reintroduces many of the problematic elements of the earlier drafts of S.B. 2320 in 2019.

In order to demonstrate just how far NDUS has already come to meet the bill's purposes, and intends to go in the future, I'd like to walk through the proposed changes, set out in Section 1, Subsections 1-5 of the H.B. 1503 and point out that nearly every single aspect of the proposed bill is already encompassed or is already proposed for inclusion in SBHE Policy 503.1. H.B. 1503 is nothing more than a solution seeking a problem that does not exist in North Dakota.

Subsection 1 of H.B. 1503 that guarantees students the right to free speech is already recognized in SBHE Policy 503.1 Section 2.

2. SBHE Policy on Student Free Speech and Expression

- a. The SBHE recognizes that students have a fundamental right to free speech and expression under the First Amendment to the United States Constitution and Article I, Section 4 of the North Dakota Constitution, and as a result the SBHE and institutions under its control shall ensure that students have the freedom to speak, write, listen, challenge, learn, and discuss any issue, subject to reasonable and constitutionally-recognized limitations.

Subsection 2 of H.B. 1503 recognizing constitutional time, place, and manner restrictions is detailed in SBHE Policy 503.1 Section 2, Subsection (c)(i-iii).

- e. Institutions under the control of the SBHE shall control the availability of campus spaces for free speech and expressive activity as follows:
- i. Institutions shall maintain the generally accessible, open, outdoor areas of its campus as traditional public fora for free speech by students, faculty, student organizations, and members of the public, subject to reasonable and constitutional time, place, and manner restrictions. Institutions may require students, faculty, student organizations, and members of the public to obtain a permit to reserve the exclusive use of an outdoor space constituting a traditional public forum. Such permits may not be issued or denied based on the content of the message or viewpoint the permit requestor seeks to convey.
 - ii. Institutions may only designate as restricted or designated forums: (1) those areas inside buildings which have not otherwise been treated as traditional public fora; (2) areas in residential areas of campus during evening and overnight hours; (3) areas immediately surrounding academic buildings during times when classes are held in that building; (4) areas which must be restricted due to reasonable safety and security concerns; (5) areas which must be restricted to enable the flow of pedestrian or vehicle traffic; and (6) areas surrounding building entrances and exits to provide for safe and convenient ingress and egress from those buildings. Institutions may only designate an area of campus as a restricted or designated forum on the grounds of an educational, safety or security, or health-related reason (e.g. ensuring a quiet residential environment for students in residence halls). Institutions may grant permits to students, faculty, student organizations, or others to exercise free speech or expression in such restricted or designated fora based on content-neutral criteria.
 - iii. Institutions may close to free speech or expressive activity those areas which are not designed for the exercise of free speech or expression or which have traditionally not been open to the exercise of free speech or expressive activity.

As you can see, the SBHE policy (and the campus policies which are based on this policy) are clear regarding which areas are open to expression and which are restricted. Quite frankly, the ambiguity Mr. Cohn mentioned regarding what areas were required to be a public forum under existing law does not exist.

Subsection 3 of H.B. 1503 attempts to address issues related to academic freedom for faculty stating that “at a minimum, no faculty member will face adverse employment action for classroom speech, unless the speech is not reasonably germane to the subject matter of the class as broadly construed and comprises a substantial portion of classroom instruction.” However, this definition is far too narrow, as it excludes much of the faculty’s academic work, including in office hours, mentoring, research, grant applications, participation in academic conferences, publishing in peer-reviewed journals, and similar areas. The language itself is also so vague as to be arguably unconstitutional, or

at least unworkable: what do the phrases “classroom speech” or “reasonably germane” mean? How can campuses hold faculty members to these standards when they are not defined?

I’d like to point out to the Committee that academic freedom is more fully outlined in SBHE [Policy 401.1](#) Academic Freedom, but addresses the same issues raised in H.B. 1503.

4. Classroom Speech and Expression. Faculty at institutions under the control of the SBHE shall generally adhere to the 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments adopted by the American Association of University Professors, which provides that “Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.” Notwithstanding, faculty shall not face discipline or adverse employment action based on classroom speech unless such speech violates other institutional policies or procedures.

The policy, as does current law, refers to the AAUP, which is the standard often relied upon by accreditation organizations.

Subsections 4(a)(b) and (c) lay out a highly restrictive definition of student-on-student harassment. The NDUS has now proposed a revised definition of student-on-student harassment in SBHE Policy 503.1, based on the feedback from the House hearing earlier this session:

g. **Student-on-Student Harassment** – An institution may only discipline students for student-on-student harassment which meets one or more of the following criteria:

- i. (1) ~~(1)~~ Unwelcome verbal, written, or physical conduct directed to another student or a specified group of students; (2) ~~directed to an individual which a reasonable person would find offensive or defamatory and which does not constitute protected conduct that is lewd, obscene, defamatory, unlawful, has the purpose of causing distress, or is based on the student's (or students') actual or perceived personal characteristics; and either (3a) objectively and subjectively creates a hostile or disruptive environment or substantially interferes with the student's educational work; or (3b) the conduct is so severe, pervasive, or objectively offensive that it is reasonably likely, based on specific and documented facts, to create a substantial disruption to the educational environment or to effectively deny a student equal access to educational opportunities or benefits provided by the institution;~~
- ii. (2) ~~e~~ Conduct which violates North Dakota criminal laws prohibiting harassment, stalking, menacing, criminal coercion, or similar behavior;
or
- iii. (3) ~~e~~ Conduct which would constitute a violation of Title VI or VII of the Civil Rights Act of 1964, as amended or Title IX of the Education Amendments of 1972 (or similar state and federal laws).

This proposed language, which was drafted by NDUS's legal counsel in consultation with the attorneys for the campuses, meets all of the requirements set forth in caselaw for student harassment policies.

On the other hand, the proposed statutory definition in H.B. 1503 is taken from a case named *Davis v. Monroe County School Board*, and is the standard adopted by the Supreme Court for students who sue their school for failing to stop harassment, not the standard for preventing students from harassing each other. This proposed definition is identical to the standard for Title IX violations under federal regulation, but the federal regulators reassured campuses that they would be able to address conduct which does not meet this strict standard using a campus student code of conduct. This standard is also far more strict than the requirements of Title VI of the Civil Rights Act and other federal anti-discrimination legislation, which will be discussed in more detail by Donna Smith, the Director of Equal Opportunity & Title IX at the University of North Dakota.

The proposed definition in H.B. 1503 would also prevent NDUS institutions from taking action to stop criminal conduct under North Dakota Law, including menacing (N.D.C.C. 12.1-17-05), criminal coercion (N.D.C.C. 12.1-17.06), harassment (N.D.C.C. 12.1-17-07), or stalking (N.D.C.C. 12.1-17-07.1), unless based on a protected class and meeting this almost impossible definition.

Our general counsel is here and would be happy to answer questions on these and other legal points at the conclusion of our testimony.

Proposed Section 5(a) requires campuses to maintain the generally accessible, open, outdoor areas of campus as traditional public forums. Section 2(e)(i) of SBHE policy 503.1 already does just that:

- i. Institutions shall maintain the generally accessible, open, outdoor areas of its campus as traditional public fora for free speech by students, faculty, student organizations, and members of the public, subject to reasonable and constitutional time, place, and manner restrictions. Institutions may require

By generally opening such areas of campus to expressive activity, the NDUS also complies with Proposed Section 5(b), which prohibits the restriction of student free speech to “free speech zones.” As the NDUS made clear to the House and Senate Education Committees in 2019 (and in 2017), NDUS campuses do not, and have never, restricted student speech to free speech zones. NDUS’s objection to using that term has always been one of definition – different people define “free speech zones” in different ways. It became clear during the 2019 testimony that some of the proponents of the bill objected to constitutional time, place, and manner restrictions and called the same “free speech zones,” as opposed to the more normal definition: a broad restriction on controversial speech to a small, sometimes inconvenient area of campus. NDUS agrees that such restrictions are unconstitutional, and none of its campuses has ever imposed such a limitation.

Proposed Section 5(c) would prevent institutions from denying student activity fee funding to a student organization based on viewpoints the student organization advocates. To be clear, NDUS does not permit discriminating against student organizations based on their viewpoints, and enshrined this rule in Policy 503.3, Student Political Rights:

4. **Student Organizations.** Student organizations shall be free to engage in civic engagement and political activities and advocacy without interference or restraint by the SBHE, NDUS, or any NDUS Institution, subject to the requirements and limitations of this policy.
- a. Student organizations shall be permitted to use any funding or resources provided by the institution or student government to provide educational or service-based events or experiences for members of the organization or campus community, such as (but not limited to) inviting speakers to campus, hosting debates or forums, or attending local, state, or national conferences or conventions, even if such events or experiences may be interpreted as “political” or “partisan” by an outside observer.

As a result of this and other non-discrimination provisions in SBHE and institution policies, NDUS institutions have never denied student activity fee funding to a student organization based on their

viewpoint. The NDUS, however, has drafted additional language for the Board's consideration regarding Policy 503.1 that explicitly prohibits denying student activity fee funding to a student organization.

Proposed Section 5(d) of the policy is also addressed by Section 2(e) of Policy 503.1, which provides that NDUS institutions may require permits only for the exclusive use of outdoor spaces. There is no permit requirement for spontaneous gatherings or assembly, and outdoor distribution of literature is only subject to constitutional time, place, and manner restrictions in institutional policies (i.e. not within a certain distance of an entrance or exit to a building).

Proposed Section 5(e), which regards security fees, of H.B. 1503 is already largely included in SBHE Policy 503.1. The only place where the current policy diverges from the proposed legislation is that the Policy permits the assessment of security fees based on anticipated security fees. This element of the policy was put in place due to budgetary concerns – the media is full of examples of campuses having to spend tens or hundreds of thousands of dollars to provide security for controversial speakers. Most or all NDUS institutions simply do not have the budget to pay for such security. However, based on federal litigation outside of North Dakota and guidance received over the last two years, the NDUS has already begun the process to remove this allowance from the SBHE policy, and in fact campuses have long been instructed not to impose security fees based on expected protest activity without the approval of their campus attorney, so this provision has never been used. NDUS institutions have always done an excellent job facilitating the attendance of controversial speakers on campus, often without incurring additional expenses. However, should an NDUS institution incur security costs which exceed their budgetary means, it may well come to the legislature with a deficiency funding request during the next legislative session, and we hope the legislature will be amenable to reimbursing that expenditure. This is an example of a concern which could have been addressed by simple communication.

Similarly, Proposed Sections 5(f) and 5(g) are also covered by SBHE Policy 503.1:

f. Students, faculty, and student organizations shall be permitted to invite guest speakers or groups to campus, and institutions may not prohibit or disinvite such guest speakers based on the anticipated content or viewpoint of their speech or expression.

Proposed Section 5(h) would require that “an institution may not discriminate against a student organization with respect to a benefit available to any other student organization based on a requirement of the organization that leaders or voting members of the organization: (1) Adhere to

the organization's viewpoints or sincerely held beliefs; or (2) Be committed to furthering the organization's beliefs or religious missions”.

The NDUS does not take a position as to this particular provision, but notes that this is already required by federal regulation for religious student organizations. As a result, the following language has been proposed to be added to Policy 503.1:

g. Institutions may not treat a student organization differently (i.e. more favorably or more negatively) than other student organizations with respect to the provision of any right, benefit, or privilege based on a requirement in the organization's constitution or bylaws that leaders or voting members of the organization shall (1) adhere to the organization's viewpoints or sincerely held beliefs; or (2) be committed to furthering the organization's viewpoint or mission.

Please note that the NDUS has gone farther than is required by the regulation, which only protects religious student organizations. As we do not consider it appropriate to seek to define what makes a student organization “religious,” we have included language that protects all student groups.

I am not here today to say that SBHE Policy 503.1 is perfect – as I have noted, there are places where NDUS has already proposed edits to be more closely aligned with the intent of H.B. 1503. However, given that the existing policy was required to be put in place in only four months, during the summer (when most NDUS stakeholders are not on campus), some work on the policy was to be expected. The NDUS has always been open to feedback from legislators, constituents, and groups like FIRE on its existing policies, and welcomes continued and open dialogue with these same constituencies.

However, the issues that I have highlighted in my testimony today underscore why the NDUS must retain the flexibility to react to ever-changing federal law and court rulings. Courts are consistently reaching conflicting decisions regarding campus speech issues, and the current administration has already ordered reviews of the new Title IX regulations and the provisions which protect religious student organizations. More than ever, the NDUS and its institutions are perfect examples of how local control can result in a more nimble and effective response to changing conditions. H.B. 1503 is unnecessary and punitive at best, and would actively harm the ability of NDUS's campuses to adapt to changing laws and regulations.

The institutions of the NDUS are unreservedly supportive of free speech. Despite the fact that our campuses have not encountered any substantiated cases of restrictions being placed on free speech, have had no speakers shouted down, no visitors assaulted, no “disinvited” speakers, and no student

complaints for at least the last 12 years, which is remarkable in the current political environment, there are still external forces that continue to perpetuate the notion that North Dakota colleges and universities are actively working against free speech and freedom of expression. While that may be true of certain coastal institutions, this is simply not true of NDUS institutions.

I respectfully recommend a “do not pass” on H.B. 1503 and wish to iterate the willingness of the North Dakota University System to work with this Committee and others, including FIRE as we have in the past, to better understand and address any unresolved concerns. Additionally, if there is a concern that there are ongoing free speech issues on NDUS campuses, the NDUS wholeheartedly supports the amendment of H.B. 1503 into a study of free speech on NDUS campuses. I stand for questions from the Committee.